JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

September 26, 2005

Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Dear Mr. Chairman:

I write to transmit the views recently adopted by the Judicial Conference of the United States regarding S. 1088, the "Streamlined Procedures Act of 2005" (109th Cong.), as amended by the Senate Judiciary Committee on July 28, 2005. Some of these views are applicable to H.R. 3035, a similar bill introduced in the House on June 22, 2005. This letter supplements the information provided to you in my letter dated July 13, 2005, in which we explained the Conference's opposition (based on previously adopted positions) to particular provisions within sections 8, 9, and 11 of S. 1088, as introduced.

On September 20, 2005, the Judicial Conference determined to:

a. Express support for the elimination of any unwarranted delay in the fair resolution of habeas corpus petitions filed by state prisoners in the federal courts;

b. Urge that, before Congress considers additional amendments to habeas corpus procedures, analysis be undertaken to evaluate whether there is any unwarranted delay occurring in the application of current law in resolving habeas corpus petitions filed in federal courts by state prisoners and, if so, the causes for such delay;

c. Express opposition to legislation regarding federal habeas corpus petitions filed by state prisoners that has the potential to: (1) undermine the traditional role of the federal courts to hear and decide the merits of claims arising under the Constitution; (2) impede the ability of the federal and state courts to conduct an orderly review of constitutional claims, with appropriate deference to state-court proceedings; and (3) prevent the federal courts from reaching the merits of habeas corpus petitions by adding procedural requirements that may complicate the resolution of these cases and lead to protracted litigation, including the following sections of the proposed "Streamlined Procedures Act of 2005" in the 109th Congress (H.R. 3035 as introduced and S. 1088 as amended in July 2005):

Section 2 of H.R. 3035 and S. 1088 (mixed petitions);
Section 4 of H.R. 3035 and S. 1088 (procedurally defaulted claims);
Section 5 of H.R. 3035 and S. 1088 (tolling of limitation period);
Section 6 of H.R. 3035 (harmless errors in sentencing); and
Section 9(a) of H.R. 3035 (federal review of capital cases under chapter 154 of title 28, United States Code);

d. Express opposition to section 3 (amendments to petitions) of H.R. 3035 and S. 1088 that would prohibit the federal courts from considering modifications to existing claims or the addition of new claims that meet the requirements of current law;

e. Express opposition to section 7 of H.R. 3035 and section 6 of S. 1088 that would make the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applicable to cases pending prior to its enactment, and section 14 of H.R. 3035 and S. 1088 that would make the proposed Streamlined Procedures Act applicable to pending cases; and

f. Express opposition to the provision in section 11 of H.R. 3035 and section 10 of S. 1088 that would amend 21 U.S.C. § 848(q) to require an application for investigative, expert, or other services in connection with challenges to a capital sentence involving state or federal

prisoners to be decided by a judge other than the judge presiding over the habeas corpus proceeding.

These views, which are explained in the attachment, reflect the judiciary's long-standing concern with the fair and efficient consideration of the constitutional issues that arise in federal habeas corpus litigation. In general, the existing jurisdictional framework establishes a role for the federal courts in reviewing the constitutionality of state court criminal processes. The Conference has consistently supported providing competent counsel to habeas petitioners at all stages of post-conviction review in capital cases, and it has opposed legislation that would deprive the federal courts of their traditional role in reviewing federal constitutional claims arising originally in state criminal or post-conviction proceedings. The goal should be, as the Powell Committee Report[1] noted, to secure a meaningful presentation of the issues to the state and federal courts and then to avoid further repetitive litigation.

Over the past ten years the federal judiciary has addressed and resolved issues related to the implementation of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). That body of law, though not entirely settled, now provides guidance to the courts in resolving habeas corpus claims and attempts to strike an appropriate balance between providing a forum in which the rights of individuals with meritorious claims can be heard and the need to ensure that the criminal justice system can function without unreasonable delay in bringing finality to the process.

Proponents of the Streamlined Procedures Act have referred to particular habeas corpus capital cases initiated by state prisoners that were pending in federal courts for a lengthy period. The Judicial Conference Committee on Federal-State Jurisdiction has conducted a preliminary review of statistical data related to the handling of non-capital and capital cases in the federal courts, which is outlined in the attachment. The Conference does not believe that the data as a whole supports the need for a comprehensive overhaul of federal habeas jurisprudence. The Conference would urge Congress to undertake further analysis to evaluate whether there is any unwarranted delay and if so, the causes for such delay. The Judicial Conference is available to work with the Congress to attempt to gather such information to be used in a methodical review of the

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[1] 1989 Report of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (Powell Committee Report).

handling of such cases.[2] The Judicial Conference remains supportive of efforts to eliminate any unwarranted delay in the fair resolution of habeas corpus petitions filed by state prisoners in the federal courts.

Much of the law related to habeas corpus (including the exhaustion and procedural default rules) seeks to ensure that the state courts will have an opportunity to consider all the federal claims in the first instance. Only after state avenues have been exhausted do the federal courts consider the federal claim, and only when the state courts have committed errors in the application of federal law, or made an unreasonable determination of the facts in light of the evidence, will any relief be granted.

The proposed Streamlined Procedures Act would take a substantially different approach to federal habeas review. It attempts to expedite the processing of habeas corpus petitions by creating a stringent system of forfeitures for federal constitutional claims. Not only could it create unreasonable obstacles to resolution of such claims, but it has the potential for complicating and protracting litigation in both state and federal courts. Furthermore, because there is no federal right to counsel in state post-conviction proceedings, except for capital cases under chapter 154, these procedural requirements may prove very difficult for applicants to meet.

The judiciary's review of S. 1088 and H.R. 3035 has centered around an examination of whether the legislation would afford defendants a meaningful opportunity to adjudicate their constitutional rights in the state and federal courts, and, at the same time, provide for expeditious consideration and disposition of the issues presented in their habeas petitions. The Conference has expressed opposition to provisions it believes would interfere with those goals. Thank you for your consideration of the Judicial

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[2]We note that an amendment may be offered to S. 1088 that would call upon the Judicial Conference to conduct a study of the processing of habeas corpus petitions. As noted above, the Conference supports first evaluating whether unwarranted delay occurs in the application of current law and, if so, the causes of such delay, and it would be willing to examine data relevant to that inquiry. The study proposed in the amendment, however, may be extremely difficult to implement in the time frames provided, particularly if the study does not provide flexibility in how it is structured and the methodology for collecting such information. In addition, the study as proposed in the amendment may be costly to implement, and may require the collection of information that may not address the concerns raised by the Streamlined Procedures Act.

Conference's position regarding the Streamlined Procedures Act of 2005.[3] If you have any questions, please feel free to contact me at 202-273-3000, or, if you prefer, you may have your staff contact Karen Kremer in the Office of Legislative Affairs at 202-502-1700.

Sincerely,

Leonidas Ralph Mecham
Secretary

Attachment: Explanation of Views

cc: Honorable Patrick J. Leahy,
Ranking Democrat, Committee on the Judiciary
Honorable Jon Kyl
Members of the Committee on the Judiciary

[3]We also understand that an amendment may be offered to S. 1088 related to the "Rules Governing Section 2254 Cases in the United States District Courts" to enhance discovery rights of petitioners in capital cases. The Judicial Conference has a longstanding policy opposing proposed legislation that directly amends the Federal Rules of Practice and Procedure, including the habeas corpus rules, outside the Rules Enabling Act rulemaking process (28 U.S.C. § 2071-2077). In addition, it should be noted that applying the discovery procedures under Criminal Rule 16 to habeas corpus proceedings, which are civil in nature, may raise substantive problems as well. The Conference would urge the Senate Judiciary Committee to defer taking action on the proposal.

EXPLANATION OF VIEWS
Positions Adopted by the Judicial Conference of the United States[1] on September 20, 2005, Regarding the "Streamlined Procedures Act of 2005" (S. 1088, as amended by a Substitute Amendment on July 28, 2005, and H.R. 3035)

a. The Judicial Conference expresses support for the elimination of any unwarranted delay in the fair resolution of habeas corpus petitions filed by state prisoners in the federal courts.

b. The Judicial Conference urges that, before Congress considers additional amendments to habeas corpus procedures, analysis be undertaken to evaluate whether there is any unwarranted delay occurring in the application of current law in resolving habeas corpus petitions filed in federal courts by state prisoners and, if so, the causes for such delay.

The federal judiciary supports the goal of expediting review of habeas corpus cases in the federal courts and believes that handling cases efficiently and effectively benefits litigants, victims of crime, the public, and the judicial system. It has consistently encouraged Congress to provide for procedures that will facilitate a fair resolution of claims brought by state prisoners in federal court. Such fair resolution encompasses the notion that petitioners will be provided a meaningful opportunity to adjudicate their constitutional rights in the state, as well as federal courts.

To examine recent assertions that there are widespread delays in the processing of habeas corpus petitions in the federal courts, the judiciary reviewed information compiled by the Statistics Division of the Administrative Office of the U.S. Courts (AO). In fiscal year 2004,[2] there were 18,432 non-capital habeas corpus petitions filed by state prisoners in U.S. district courts, and 6,774 in the U.S. courts of appeals. The total number of terminations for 2004 revealed that the federal courts are terminating nearly as many non-capital habeas corpus petitions from state prisoners as are filed annually.

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[1]On July 13, 2005, the Judicial Conference sent a letter to members of the Senate Judiciary Committee stating its opposition to certain provisions in sections 8, 9, and 11 of S. 1088, as introduced, based on previously adopted Conference positions. On July 22, 2005, the Judicial Conference sent a similar letter to members of the House Judiciary Committee on H.R. 3035.

[2]Statistical records of the Administrative Office of the U.S. Courts are based on a fiscal year ending September 30 of each year.

The median time from filing to disposition for state non-capital habeas corpus cases in the district courts has remained relatively constant since 1998, and in 2004 was six months. In the courts of appeals, the median time from filing of notice of the appeal to disposition of state non-capital habeas corpus appeals also remained relatively stable between 1998 to 2004, ranging from 10 to 12 months. Thus, the statistics appear to indicate that the district and appellate courts are handling non-capital habeas corpus petitions originating from state prisoners expeditiously.

With respect to capital habeas corpus petitions originating from state prisoners, the statistics indicate that the number of these cases pending in the federal district courts has been growing. From 1998 to 2002, more state capital habeas corpus cases were filed in the district courts than were concluded. As a result, the number of state capital habeas corpus cases pending increased from 466 at the end of 1998 to 721 at the end of 2002. In 2003 and 2004, the number of state capital habeas corpus cases terminated by district courts nearly equaled the number of cases filed, so the growth in the pending caseload has slowed and was 732 at the end of 2004.

In addition to increases in the number of pending state capital habeas corpus cases in the district courts, the pending and disposition times for these cases have increased. The percentage of state capital habeas corpus cases pending more than three years rose from 20.2 percent at the end of 1998 to 46.2 percent at the end of 2004. The median time from filing to disposition for state capital habeas corpus cases was 13 months in 1998, rose to 24.5 months in 2001, fell to 20 months in 2003, and rose again in 2004 to 25.3 months.

Looking at the entire civil docket, 12.6 percent of all civil cases in 2004 were pending in the federal district courts three years or more. Even though state prisoner habeas corpus proceedings comprised 6.6 percent of all civil cases filed in 2004, they amounted to only approximately 3 percent of civil cases pending for three years or more. Capital habeas corpus cases filed by state prisoners comprised slightly less than one percent (0.97) of civil cases pending three years or more.

In the courts of appeals, the number of terminations of state capital habeas corpus cases generally kept pace with the number of filings of these cases between 1998 and 2000. Beginning in 2001, however, the number of state capital habeas corpus cases terminated in the courts of appeals was generally lower than the number filed, resulting in increases in the number of these cases that are pending. From the end of 1998 to the end of 2004, pending state capital habeas corpus cases rose from 185 to 284.

The median time from filing of notice of the appeal to disposition for state capital habeas corpus appeals ranged from 10 to 13 months between 1998 and 2000. The median time from filing of notice to disposition for these cases increased to 15.5 months in 2001, dropped to 13 months in 2003, and rose in 2004 to 15 months. In addition, state capital habeas corpus appeals that were pending in the courts of appeals three years or more increased from 5 (2.7 percent of all pending state capital habeas corpus cases) at the end of 1998 to 36 (12.7 percent of all pending state capital habeas corpus cases) at the end of 2004.

The statistical information currently available from the AO does not support a finding of undue delay overall with respect to the processing of non-capital cases. With respect to capital cases, the statistics indicate that the median time from filing to disposition has increased in both the federal trial and appellate courts, and that the number of capital cases pending for three years or more has also increased. However, without further information, the judiciary is unable to draw a definitive conclusion as to the causes for these increases or to reach the conclusion that these time frames are unreasonable in light of the complexity of capital federal habeas corpus jurisprudence.

Additional study on this point should be undertaken before legislation is pursued that would further alter habeas corpus practice and procedure. The Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) at their joint annual meeting held July 30-August 3, 2005, adopted a resolution similarly urging that additional study and analysis be undertaken to evaluate the impact of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) to date and the causes of unwarranted delay, if any. The CCJ and COSCA also supported delaying further action on amending AEDPA or otherwise changing the existing statutes affecting the filing and processing of habeas corpus petitions in the federal courts as contemplated in H.R. 3035 and S. 1088.

Thus, before Congress moves forward, analysis should first be conducted regarding the impact of AEDPA on the handling of habeas corpus cases, particularly capital habeas corpus cases, and the factors that may affect the length of time required to process a habeas corpus case in the federal courts. Such analysis could be undertaken by Congress, the federal judiciary, or a combination thereof. Should systemic problems be identified, the judiciary would be willing to work with Congress in seeking solutions to ensure the effective and expeditious administration of justice.

c. The Judicial Conference expresses opposition to legislation regarding federal habeas corpus petitions filed by state prisoners that has the potential to: (1) undermine the traditional role of the federal courts to hear and decide the merits of claims arising under the Constitution; (2) impede the ability of the federal and state courts to conduct an orderly review of constitutional claims, with appropriate deference to state-court proceedings; and (3) prevent the federal courts from reaching the merits of habeas corpus petitions by adding procedural requirements that may complicate the resolution of these cases and lead to protracted litigation, including the following sections of the proposed "Streamlined Procedures Act of 2005" in the 109th Congress (H.R. 3035 as introduced and S. 1088 as amended in July 2005):

Section 2 of H.R. 3035 and S. 1088 (mixed petitions);
Section 4 of H.R. 3035 and S. 1088 (procedurally defaulted claims);
Section 5 of H.R. 3035 and S. 1088 (tolling of limitation period);
Section 6 of H.R. 3035 (harmless errors in sentencing); and
Section 9(a) of H.R. 3035 (federal review of capital cases under chapter 154 of title 28, United States Code).
[*Note: each section is discussed infra.*]

Section 2 of H.R. 3035 and S. 1088 (mixed petitions)
Current Law

Under current law, a petitioner is required to exhaust specific federal claims in the state courts, either on direct review or in the state post-conviction proceedings.[3] A failure to comply with this requirement generally would preclude federal review of the claim. Failure to exhaust a claim in state court may be excused, however, in cases where the state offers no corrective process or where that process would not provide an effective remedy for the petitioner's claim. *See* 28 U.S.C. § 2254(b)(1)(B)(i) and (ii).[4]

In addition, current law provides a procedure for judicial consideration of mixed petitions, meaning petitions that include claims that have been fully presented to the state courts (exhausted claims) and those that have not (unexhausted claims). The mixed-petition issue first arose before AEDPA was enacted, when the Supreme Court adopted

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[3]*See* Baldwin v. Reese, 541 U.S. 27 (2004) (requiring the habeas corpus petitioner to specifically identify the federal law underpinning a claim of ineffective assistance of appellate counsel).

[4]*See also* Lynce v. Mathis, 519 U.S. 433, 436 n.4 (1997) (excusing the failure to exhaust an *ex post facto* claim, noting that the state supreme court had previously rejected such claims and there was no reason for the petitioner to expect that the court would decide petitioner's claim differently).

the complete-exhaustion rule of *Rose v. Lundy*, 455 U.S. 509 (1982). Under that rule, federal courts dismissed mixed petitions without prejudice. The decision assumed that, following dismissal, the state prisoner would return to state court to exhaust available state remedies and then refile his or her federal habeas corpus petition containing only exhausted claims.

AEDPA amended the federal habeas corpus process in significant ways, notably by imposing a statute of limitations for all habeas corpus petitioners. Under AEDPA, state prisoners are given one year to file their federal habeas corpus petitions following the completion of direct review. *See* 28 U.S.C. § 2244(d). This period is tolled once the petition for state post-conviction relief is properly filed and while it remains pending. *See* 28 U.S.C. § 2244(d)(2).

The adoption of the time limits in AEDPA and the complete-exhaustion rule of *Rose v. Lundy* interacted to present a problem for habeas corpus petitioners. If the federal courts dismissed a mixed petition, as required by *Rose,* then the state prisoner could exhaust claims by submitting them to state court. But the dismissal meant that the federal habeas corpus prisoner could no longer rely upon his earlier federal habeas corpus filing date to satisfy the one-year limitation period. Instead, the federal petitioner would have to refile in federal court following exhaustion, which in some cases could present a timeliness issue for petitioners.

The lower federal courts developed a variety of approaches to the resulting problems of potential unfairness, prompting the Supreme Court to resolve the issue as recently as the last term. In *Rhines v. Weber*, 125 S. Ct. 1528 (2005), the Court ruled that the district court may, in appropriate cases, stay proceedings on a mixed petition in order to preserve the petitioner's filing date. Such a stay would enable the petitioner to exhaust state remedies in state court and return, if necessary, to federal court to pursue the now fully exhausted petition. But while it recognized the importance of a stay option, the Court also required some scrutiny of the unexhausted claims. Only where the petitioner could show good cause for the failure to exhaust, where the unexhausted claims met a standard of "potentially meritorious," and where the petitioner had not engaged in any intentionally dilatory litigation tactics would the Court permit the stay to issue. *See id.* at 1535.

Proposed Changes

Section 2 of H.R. 3035 and S. 1088 would amend 28 U.S.C. § 2254 in three respects. First, it would require petitioners to fairly present and argue the specific basis for each claim in state court and describe in the federal habeas corpus petition how each claim was exhausted in state court.

Second, it would require the dismissal with prejudice of any unexhausted claim, unless that claim would qualify for consideration on the grounds set forth in existing provisions of 28 U.S.C. § 2254(e)(2). That provision establishes standards that limit the authority of federal courts to hold evidentiary hearings on claims the petitioner failed to develop factually in state court. Thus, section 2254(e)(2) now applies to a narrow subset of habeas claims. The Streamlined Procedures Act would apply these standards to a much broader range of habeas claims. The apparent goal of the Streamlined Procedures Act is to enable the district court to determine the merits of the petition consisting of exhausted claims immediately, without the possibility of a stay during which the petitioner could return to state court to litigate unexhausted claims.

The standards set forth in section 2254(e)(2) are as follows:

- As to legal claims, section 2254(e)(2) requires the petitioner to show that the constitutional right at issue is a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court. This defines a very small universe of possible legal claims. The Supreme Court has only rarely concluded that new rules of substantive constitutional law apply retroactively to habeas corpus petitioners (such as the Court's decision barring the execution of juvenile offenders), and it is extremely unlikely to make any procedural rule retroactively applicable to habeas corpus petitioners. By adopting the standard of "new rules" made retroactively applicable, the Streamlined Procedures Act would eliminate review of virtually all unexhausted legal claims.

- As to factual claims, section 2254(e)(2) requires the petitioner to show that he or she could not have discovered the predicate for the factual claim in the exercise of reasonable diligence, and show, by clear and convincing evidence, that no reasonable fact finder would have found the petitioner guilty of the underlying offense, before he could secure review of unexhausted claims. Absent DNA evidence, this standard will likely foreclose many unexhausted claims.

The Streamlined Procedures Act adds an additional requirement as to both legal and factual claims that the denial of relief in the habeas corpus proceeding would be contrary to or involve an unreasonable application of clearly established federal law as determined by the Supreme Court.

Third, section 2 of both bills makes a significant change in the legal standard for exhaustion of state remedies by deleting the language in current law that excuses a failure to exhaust in circumstances where the state offers no corrective process or where that process would not actually provide an effective remedy for the petitioner's claims.

Commentary

Because the Supreme Court has recently addressed this issue, section 2 of the Streamlined Procedures Act is unnecessary. Instead of facilitating submission of unexhausted claims for consideration by the state courts, section 2 would severely restrict federal review of such claims. This approach differs significantly from that adopted by the Supreme Court in *Rhines*, which would permit a court to stay a mixed petition if the petitioner shows good cause for the failure to exhaust, where the unexhausted claim is potentially meritorious, and where the petitioner has not engaged in any dilatory tactics. The legislation would undermine a system that currently respects state court processes by permitting the states to correct any errors, while at the same time preserving a federal forum for the review of meritorious constitutional claims. The federal courts may also be prevented from providing relief even in situations where the state offers no corrective process.

If the legislation were enacted, petitioners would run the risk of forfeiture if they failed to assert claims that had little prospect of success in state court but had not yet been considered in federal court. Apart from the risk of forfeiture, this more demanding exhaustion standard would likely broaden the range of claims presented to state courts, and make the process more difficult for petitioners, particularly those without counsel, as they attempt to comply with the rigorous pleading requirements.

Section 4 of H.R. 3035 and S. 1088 (procedurally defaulted claims)

Current Law

In general, procedural defaults occur when the state prisoner or his or her lawyer fail to raise and properly argue defenses to the imposition of criminal liability. When defaults occur, the state will argue that the petitioner has procedurally defaulted the claim (including any federal constitutional claim) and that the state court should, therefore, decline to review the claim.

State courts take a variety of approaches to the problem of procedural defaults, depending on the importance of the procedural rule and the nature and strength of the federal claim. In some cases, state courts may require strict adherence to the procedural rule and foreclose consideration of a federal claim. In other cases, where the state perceives the procedural rule to be of somewhat less significance and where the federal claim may have some merit, the state court may couple its consideration of the procedural issue with some consideration of the federal claim. States might, for example, enforce a default and then consider the federal claim only for the purpose of preventing a miscarriage of justice or to address potentially serious constitutional claims. In some cases, the state might forgive the default altogether.

Under current law, a federal court cannot reach the merits of a claim if the petitioner failed to comply with a state procedural rule that is "adequate and independent,"[5] unless the petitioner can show "cause and prejudice" for the default, or make a showing of actual innocence. *See Wainwright v. Sykes,* 433 U.S. 72 (1977); *see also Murray v. Carrier,* 477 U.S. 478 (1986). Under the cause-and-prejudice standard, a petitioner must show a valid reason for the failure to comply with the state rule, and must show that the resulting prejudice was substantial. Thus, the exceptions that would permit federal courts to review a claim that was procedurally defaulted at the state level are already very narrow.

The Supreme Court has treated ineffective assistance of counsel as "cause" for relief from the default of claims at an earlier stage of the process. State defendants have a right under the Sixth Amendment to constitutionally effective lawyers at trial and on direct review; if the state fails to provide such lawyers, it has violated the defendant's constitutional rights. Such failures, in turn, relieve the state prisoner from the procedural defaults that the ineffective lawyer may have committed during the course of the proceeding. Ineffective assistance of counsel claims frequently appear in federal habeas corpus petitions because they provide a basis for reopening any procedural defaults that may have occurred at earlier stages.[6]

Proposed Changes

Section 4 of H.R. 3035 and S. 1088 would amend 28 U.S.C. § 2254 to add a new subsection 2254(h)(1)-(5) to:

- Prohibit federal courts from considering a claim that a state court previously refused to consider on the basis of some procedural error committed by the prisoner or his lawyer in state court, unless the defaulted claim would qualify for

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[5]In order for a procedural default in state court to bar federal court review, that state rule must be "adequate," meaning that it is sufficient to uphold the judgment of the state court, and it must be "independent,"which means that the rule must not depend on the court's view of the merits of the federal claim.

[6]The Supreme Court has long held that the right to counsel attaches at trial and to the first appeal as of right. *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (trial); Murray v. Giarrantano, 492 U.S. 1, 7 (1989) (first appeal of right in state court). While the Court has not extended the right to counsel to state post-conviction proceedings, *see* Coleman v. Thompson, 501 U.S. 722 (1991), it has specifically reserved the question whether counsel may be required in circumstances where state post-conviction proceedings provide the first realistic opportunity to challenge a conviction. *Id.* at 755. The most clear-cut example of such a first-opportunity claim would be in a case involving a claim that counsel at trial and on direct appeal were constitutionally ineffective.

consideration under section 2254(e)(2).[7] This is the same standard that would govern federal court review of unexhausted claims under the Streamlined Procedures Act.

- Prohibit federal courts from considering a claim when the state court both reached the merits of the claim and treated it as barred under a procedural rule, unless the claim would qualify for consideration under section 2254(e)(2). Today, such alternative grounds of decision may not necessarily bar federal review of the merits because the state court did not actually treat the default as a bar to review.[8]

- Prohibit federal courts from considering a claim when the state court found a procedural default but also reviewed the merits of the claim for plain or fundamental error, unless the claim meets the standards of 2254(e)(2). S. 1088 substitutes the term "miscarriage of justice" for "plain error." Today, federal courts might treat the determination of the merits as forgiving the procedural default, and might themselves reach the merits.

In addition, a federal court would not be permitted to grant relief unless it also found that denial of relief would be contrary to, or would involve an unreasonable application of, clearly established federal law as determined by the Supreme Court. Section 4 of H.R. 3035 would also prohibit federal court review of ineffective assistance of counsel claims related to the procedurally defaulted claims, unless the ineffective assistance of counsel claim also met the standards of section 2254(e)(2). S. 1088 does not include similar language.[9]

Section 4 of H.R. 3035 and S. 1088 would also amend subsection 2244(d)(2), which provides that the one-year filing period shall be tolled during the time a state post-

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[7]Section 4 would also permit federal courts to hear a procedurally defaulted claim if the state, through counsel, expressly waives the provisions of proposed new subsection 2254(h)(1).

[8]In the Ninth Circuit, for example, if the alternative state and federal grounds are "interwoven" in the state-court ruling, the federal court may reach the merits. *See* Siripongs v. Calderon, 35 F.3d 1308, 1317 (9th Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995). If, on the other hand, the state and federal grounds are clearly independent and represent alternative bases for the ruling, the federal court is barred from reaching the merits. *See* Loveland v. Hatcher, 231 F.3d 640, 643-44 (9th Cir. 2000).

[9]S. 1088 as introduced was identical to H.R. 3035 in this respect. The Substitute Amendment deleted the language "or any claim of ineffective assistance of counsel related to such claim," from proposed new subsections 2254(h)(1) and 2254(h)(2)(A).

conviction petition is "properly filed."[10] Section 4 would add language to this subsection providing that an application that was otherwise improperly filed in state court shall not be deemed to have been properly filed because the state court exercised discretion in applying a rule or recognized exceptions to that rule. Although the full effect of this provision is unclear, concerns have been raised that this section would tighten the standard under which a federal court could consider a state petition as having been properly filed for purposes of tolling the one-year period.

Commentary

Section 4 of both H.R. 3035 and S. 1088 would substitute a new-rule-of-constitutional-law or actual-innocence standard for the carefully crafted standard of cause and prejudice established by the Supreme Court in *Wainwright*, the standard which currently serves as an effective gatekeeper to limit federal court review of constitutional claims that were treated by the state courts as procedurally defaulted. Federal courts would even be precluded from reviewing claims that the state court itself had reviewed on the merits for plain error (H.R. 3035) or a miscarriage of justice (S. 1088), though such claims could have been barred by state procedural rules. H.R. 3035 goes even further, prohibiting the federal courts from considering ineffective-assistance-of-counsel claims arising in connection with the procedurally defaulted claim, unless they also met the new-rule or actual-innocence standards. The current version of S. 1088 would not preclude a petitioner from raising an ineffective assistance of counsel claim in the federal habeas corpus petition that is related to a constitutional claim that has itself been procedurally defaulted. Nevertheless, the provisions of section 4 in both bills may undermine the ability of the federal courts to consider meritorious constitutional claims.

Section 5 of H.R. 3035 and S. 1088 (tolling of limitation period)

Current Law

Current law (28 U.S.C. § 2244) tolls the one-year period for filing a federal habeas corpus petition while a properly filed application for state post-conviction relief is pending (the one-year period does not begin to run until the conclusion of direct review). Today, petitioners often present some federal claims to state courts on direct review and a different set of federal claims on state post-conviction review. Both sets of claims will be viewed as exhausted and as ripe for presentation to a federal habeas corpus court when state post-conviction review ends, and the limitation period for filing the federal habeas

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[10] *See* Artuz v. Bennett, 531 U.S. 4 (2000) (treating state petition, even one that contained some procedurally defaulted claims, as properly filed for tolling purposes if directed to the right court at the right time) *see also* Pace v. DiGuglielmo, 125 S. Ct. 1807 (2005) (ruling that an untimely state post-conviction petition did not qualify as properly filed for purposes of tolling the federal limitations period).

corpus petition would be satisfied as to all federal claims, including both those that were exhausted on direct review and those that were exhausted in state collateral proceedings.

The Supreme Court in *Carey v. Saffold*, 536 U.S. 214 (2002), held that tolling should apply to the entire time the petitioner pursues state-court post-conviction relief, from the date of the initial filing in a trial court to the date of the final disposition by the final appellate body. If there are any gaps in the time that a petition is pending before a state court, those gaps are not counted against the one-year period, as long as the petitioner meets the state filing deadlines. Thus, if the state prisoner waits 30 days between the dismissal of his claims at trial and the submission of his timely state appeal, that period would not be counted against the prisoner's one-year deadline for filing a federal habeas claim.

In addition, 28 U.S.C. § 2244(d)(2) provides for the tolling of the limitation period during the pendency of state post-conviction proceedings that seek review of the "pertinent judgment or claim." In *Tillema v. Long*, 253 F.3d 494 (9th Cir. 2001), the Ninth Circuit ruled that this language entitled a federal habeas corpus petitioner to the benefit of the tolling provision by filing state post-conviction claims that challenged the state court's judgment of conviction. Such tolling was made available even where the petitioner did not present any federal claims to the state post-conviction court. The Ninth Circuit reasoned that an attack on the state "judgment" of conviction was sufficient to trigger the tolling provision, even though no federal claims were presented to the state post-conviction court. Thus, a prisoner who has already challenged his conviction as part of direct review, thereby exhausting this claim, does not run the risk that the one-year period will expire while he submits additional claims as part of the state post-conviction proceeding. Since *Tillema*, all the federal circuits that have addressed this issue have expressed agreement with its interpretation.[11]

Finally, current statutory law provides for the reopening of the limitation period to take account of a narrow range of changes in circumstances that might require habeas corpus review. *See* 28 U.S.C. § 2244(d)(1)(C), (D). Such an example might be if the petitioner discovers new evidence that would entitle him to relief or gains the benefit of a newly recognized constitutional right that the Supreme Court has made retroactively applicable to prisoners in the petitioner's situation. Current law also reopens the limitation period upon the removal of any unconstitutional impediment to the petitioner's ability to file a federal habeas corpus petition. *See* 28 U.S.C. § 2244(d)(1)(B). In

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[11] *See* Cowherd v. Million, 380 F.3d 909 (6th Cir. 2004) (collecting cases).

addition, the courts have developed a range of non-statutory bases for tolling the one-year limit based on general equitable principles.[12]

Proposed Changes

Section 5 of H.R. 3035 and S. 1088 would tighten the existing time limits for filing in three respects. First, it would charge the petitioner with any time that runs when no proceeding is actually pending in state court. Second, it would strike the words "judgment or" from section 2244(d)(2) so that tolling would apply only on a claim-by-claim basis to the claims actually presented in the state post-conviction proceeding. Third, section 5 would bar the federal courts from developing alternative bases for the equitable tolling of the one-year limitation period.

Commentary

Section 5 in both bills would overturn *Saffold* by charging the petitioner with any time that runs when no proceeding is actually pending in state court.[13] The provision striking the reference to "judgment" in section 2244(d)(2) apparently seeks to prevent a habeas corpus petitioner from gaining the benefit of tolling in cases where no federal claims have been presented to the state post-conviction court. Yet the amendment could have a much more far-reaching impact on the process of state and federal post-conviction review. Following the change in law that would occur if section 5 were enacted, tolling would no longer be available except as to "claims" that were actually presented to the state post-conviction court. This would result in significant collateral litigation on whether the claims had been properly raised, and the section would have the effect of barring claims from federal review that were not raised in the state post-conviction proceeding.

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[12]*See* Calderon v. U.S. District Court, 163 F.3d 530 (9th Cir. 1998) (tolling the limitation period on the ground that mental incapacity may have prevented the petitioner from participating in the preparation of a habeas corpus petition); *see generally* Randy Hertz & James S. Liebman, Vol. I *Federal Habeas Corpus Practice and Procedure* 239-46 (4th ed. 2001) (collecting cases in which the federal courts have expressed willingness to consider equitable tolling in cases involving judicial delay, government interference, omissions by prisoner's counsel, mental incompetence, a lack of notice of filing deadlines, and in cases of actual innocence). *Cf.* Pace v. DiGugliemo, 125 S. Ct. 1807, 1814 n.8 (2005) (leaving open the question of whether equitable exceptions apply under AEDPA).

[13]As was explained in *Saffold,* there are differences among the post-conviction procedures in various states. For example, in most states, a petitioner unsuccessful in a lower state court appeals to a higher state appellate court, while in California, an unsuccessful state petitioner files a new petition in a higher state court. It is not completely clear from the language of section 5 exactly which state systems would be affected and what the effects would be. In this respect, section 5 would add uncertainty to the functioning of the AEDPA statute of limitations.

Some petitioners might be prohibited from raising substantial claims, previously exhausted on direct review, as a result of the change of the tolling rules. Others might seek to avoid the time bar by submitting all of their federal habeas claims to the state post-conviction court, even though many such claims would have been previously (and quite recently) presented to and rejected by the state court on direct review.[14] State courts might justifiably be concerned that the alteration of federal timeliness rules would have the effect of requiring petitioners to file a series of duplicative federal claims in state court, thereby overburdening the state post-conviction review systems. Moreover, if states have strict rules as to the form and substance of post-conviction petitions, prisoners may be forced to eliminate valid claims in order to comply with these rules. For example, some states place strict page limitations on petitions filed in the state post-conviction proceeding.

Finally, by abrogating all equitable tolling by the federal courts, section 5 would limit tolling to the narrow list of considerations that appears in AEDPA. As discussed earlier, the statute reopens the limitation period only for a narrow range of cases, including a change in circumstances or where the state took action to create an impediment to the timely filing of the claim but only if it rose to the level of a constitutional violation. Although the apparent goal of this change is to encourage petitioners to act promptly in presenting their claims, petitioners may not have counsel or may suffer from mental or physical disabilities and face other constraints that make timely filing impossible. Equitable tolling now provides a framework for determining issues of fundamental fairness that avoids unnecessary and time-consuming constitutional litigation. As narrowly tailored in recent decisions of the Supreme Court, the doctrine protects the process from strategic behavior and dilatory tactics. *See, e.g., Pace v. DiGugliemo*, 125 S. Ct. 1807 (2005) (even if applicable, the doctrine of equitable tolling would apply only where petitioner diligently pursued claims).

The strict tolling rules in section 5 could result in a forfeiture of constitutional claims. Section 5 would also burden and complicate state post-conviction proceedings. Moreover, the proposed amendment could prompt petitioners to file federal petitions while still pursuing state habeas corpus appeals in order to avoid the one-year limitations period. It could also increase the number of federal petitions and require the federal court

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[14]One might argue that federal habeas corpus petitioners could avoid the temporal problems caused by the proposed change by splitting their habeas corpus cause of action in order to present their previously exhausted direct review claims to a federal court while they pursue their other federal claims in a state post-conviction proceeding. But such splitting will not work under current law, which bars the submission of a second or successive petition except in exceptional circumstances. *See* 28 U.S.C. § 2244(b)(2).

either to rule without the benefit of the decision of the highest state court or to dismiss the petition because the petitioner had not fully exhausted state remedies.

Section 6 of H.R. 3035 (harmless errors in sentencing)

Current Law

At present, federal courts in habeas corpus cases conduct harmless error analysis under the guidance of the Supreme Court's decision in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), which requires the federal court to examine the trial of the case and determine whether the constitutional error "had substantial and injurious effect or influence in determining the jury's verdict." This harmless error inquiry comes after the federal court has found a constitutional error was committed and assesses whether that error affected the decision at trial. AEDPA did not include any provisions dealing with harmless error, thereby apparently leaving the *Brecht* standard in place as the measure of harmless error.

The Supreme Court in *Arizona v. Fulminante*, 499 U.S. 279 (1991), distinguished structural errors from "trial type" errors. Under *Fulminante*, a structural error was defined as one "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310. As to structural errors, no harmless error analysis is required. The Supreme Court has recognized the following errors as structural: deprivation of the right to counsel at trial; a judge who was not impartial; unlawful exclusion of members of the defendant's race from a grand jury; the right to self-representation at trial; and the right to a public trial.[15] The Supreme Court has also determined that denial of the right to a jury verdict of guilt beyond a reasonable doubt is a structural error. *See Sullivan v. Louisiana*, 508 U.S. 275 (1993).

Proposed Changes

Section 6 of H.R. 3035 would add a new subsection (k) to 28 U.S.C. § 2254 that would prohibit a federal court from considering an application with respect to an error related to the applicant's sentence or sentencing that was found to be harmless or not prejudicial in the state-court proceedings. The federal court could grant relief only if the error were "structural," as determined by the Supreme Court. Although S. 1088, as introduced, included an identical section, the Substitute Amendment deleted this section.

Under current law, federal courts must weigh errors in the sentencing phase of a state capital proceeding to determine whether the error had a substantial injurious impact on the decision of the judge or jury. Wrongful admission of prejudicial evidence or argument by the prosecutor may raise such impact issues, as may the failure of defense

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[15] *See* Arizona v. Fulminante, 499 U.S. at 310. *See also* Campbell v. Rice, 408 F.3d 1166 (9th Cir. 2005).

counsel to introduce mitigating evidence. Under the new standard proposed in section 6, a state-court determination of the harmlessness of such an error would foreclose federal judicial review entirely.

Commentary

While AEDPA put in place a structure that provides deference to state-court processes by requiring claims to be exhausted and giving deference to state factual and legal determinations, the federal courts nonetheless retain jurisdiction in the habeas corpus proceeding to ensure that federal constitutional rights are protected. Section 6 of H.R. 3035 would effectively eliminate federal jurisdiction to examine many non-structural claims directed toward the constitutionality of a sentence, when the state court finds harmless error. If the state court determines that the constitutional sentencing error appeared "harmless" or "not prejudicial," the federal courts could not review the sentence, even to examine whether or not the conclusion reached by the state was manifestly incorrect. The only exception would be for errors deemed "structural" by the Supreme Court. It is important for the federal courts to be available to review possible errors in sentencing, particularly in capital cases where sentencing errors take on greater significance.

Section 9(a) of H.R. 3035 (federal review of capital cases under chapter 154 of title 28, United States Code)

Current Law

Chapter 154 of title 28, United States Code, establishes special expedited habeas corpus procedures for capital cases (sections 2261-2266). This chapter was added by AEDPA, and in part, is based on the recommendations of the 1989 *Report of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases* (Powell Committee Report). States may "opt-in" and take advantage of certain features of AEDPA by establishing a system for providing competent counsel to indigent defendants in capital cases in state post-conviction proceedings. Those special procedures would: (1) require a federal court to issue a final judgment on a habeas corpus petition not later than 180 days after the date on which the application is filed; (2) limit federal review of claims in such cases; (3) prohibit amendments to an application for habeas corpus relief after the filing of an answer to the application unless the amendment meets the grounds for claims under section 2244(b), which provides standards for the filing of a second or successive petition; and (4) provide certain tolling rules. Under current law, federal courts have the responsibility for determining whether a state has established a qualifying system for

providing competent counsel in state post-conviction proceedings, thereby permitting that state to "opt-in" to the special procedures.

With respect to federal court review of claims in capital cases qualifying for the special procedures under chapter 154, a federal court may consider only a claim or claims that have been raised and decided on the merits in the state court and must apply to those claims the same standards that govern habeas corpus cases generally under section 2254. If the petitioner raises a new claim not previously heard by the state court, section 2264 imposes restrictions on the availability of review. A federal court may review such a claim only if the failure to raise the claim was the result of state action in violation of the Constitution, the result of the Supreme Court's recognition of a new federal right that is made retroactively applicable, or based on a factual predicate that could not have been discovered by due diligence in time to raise the claim in state or federal post-conviction review. The provisions thus offer states an opportunity to streamline the habeas corpus review process if the quality of legal representation is improved at the state post-conviction stage of the process.

Proposed Changes

Section 9 of H.R. 3035 would shift the authority for determining whether a state has established a qualifying mechanism for providing competent counsel to the U.S. Attorney General, with limited review of the Attorney General's determination in the U.S. Court of Appeals for the District of Columbia Circuit.[16] In addition, it would replace existing section 2264 (related to the scope of federal review of such capital cases) with a new standard of review. Subsection (a) would prohibit federal courts from reviewing claims in capital cases falling within chapter 154 unless the petitioner shows that the claim relies on a new rule of constitutional law that the Supreme Court has made retroactively available to cases on collateral review, or a claim of factual innocence that would clearly convince a reasonable fact finder that the prisoner was not guilty of the underlying offense. It would also require a federal court to find that denial of relief would be contrary to, or involve an unreasonable application of, clearly established federal law as determined by the Supreme Court.

Section 8(a) of S. 1088, as amended, provides that any claim brought under section 2264 must meet the standards relating to such actions under chapter 153 of title 28.

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[16]Section 9 of H.R. 3035, as well as section 8 of S. 1088, would amend 28 U.S.C. § 2266(b)(1)(A) added by AEDPA to extend the time for a federal district court to decide a capital case under chapter 154, discussed *supra*, from the existing requirement of 180 days (6 months) after the application is filed to a requirement of 450 days (15 months) after filing, or 60 days after the date on which the case is submitted for decision, whichever is earlier. The reference to 60 days from submission may limit the actual decision time available to district court judges.

These include the standards relating to deference to state court legal and factual determinations, the review of unexhausted or procedurally defaulted claims, the holding of evidentiary hearings, and the ordering of DNA testing (as provided in section 13 of S. 1088 adding a new subsection 2254(e)(3) related to DNA testing). S. 1088 also includes the requirement that relief may not be granted unless the denial of such relief would be contrary to, or result in an unreasonable application of, clearly established federal law as determined by the Supreme Court.

Commentary

In contrast to current law, H.R. 3035 would make no provision for the regular review of the constitutional claims that the petitioner presented to a qualifying state-court system in a capital case. Rather, it would deprive the federal courts of jurisdiction to pass on any such claim, so long as the state system had been certified as one that provides competent counsel. The only exception would be for claims that would qualify for consideration under a very demanding actual-innocence standard or claims that rely on a new rule of constitutional law made retroactively applicable by the Supreme Court. Thus, even if the petitioner fully exhausts the claim at the state level and the claim is not procedurally barred, a federal court could not ordinarily consider the claim. Section 9(a) of H.R. 3035 goes well beyond current law in narrowing the availability of habeas corpus review in capital cases under chapter 154, thereby causing a severe restriction on federal court review of claims in capital cases.

S. 1088 would provide for federal court review of capital cases under chapter 154 in accordance with the standards of chapter 153. It should be noted, however, that other provisions of S. 1088 would substantially amend those chapter 153 standards. Because the Conference has already commented on those proposed amendments to chapter 153, it did not take a position on section 8(a) of S. 1088.

d. The Judicial Conference expresses opposition to section 3 (amendments to petitions) of H.R. 3035 and S. 1088 that would prohibit the federal courts from considering modifications to existing claims or the addition of new claims that meet the requirements of current law.

Current Law

In *Mayle v. Felix*, 125 S. Ct. 2562 (2005), the Supreme Court determined that in habeas corpus proceedings timeliness rules require a more particularized conception of what constitutes an "occurrence" for purposes of permitting new or modified claims to "relate back" to the date of the original pleading in order to comply with the one-year time deadline. In *Mayle*, the habeas corpus petitioner in a timely filed petition set forth a claim (under the Confrontation Clause of the Sixth Amendment) relating to the admission

of videotaped statements of witnesses against him. After the one-year time limit expired and after the district court appointed counsel to represent the petitioner, the petitioner sought to amend the complaint to raise an additional challenge (under the Fifth Amendment's rule against self-incrimination) to the admission of his own pre-trial statements. The petitioner argued that the new claim (self-incrimination) related back under Federal Rule of Civil Procedure 15(c) to the timely filing date of the old claim (confrontation).

The Court rejected the argument, adopting a fairly narrow construction of when a habeas claim will be viewed as arising from the same transaction or occurrence within the meaning of Rule 15(c) for relation-back purposes. The Court ruled that the relevant transaction or occurrence was the specific confrontation-clause claim that appeared in the initial petition. Only where the additional claim arose from that specific occurrence would relation-back be appropriate. New claims, such as the petitioner's self-incrimination claim, that rest upon facts that differ "both in time and type" from the initial claim, would not be entitled to relation-back treatment. The Court's decision in *Mayle* requires petitioners to state all of their claims in their initial habeas corpus petition; new claims added by amendment after the one-year period would be barred unless they meet the same "time and type" test for relation back.

Proposed Changes

Section 3 of H.R. 3035 and S. 1088 would extend this rule of timeliness by further narrowing the right of habeas corpus petitioners to amend their petitions. It would amend 28 U.S.C. § 2244 to add a new subsection (e) to permit an applicant to amend a habeas corpus petition "once as a matter of course" before the state files a responsive pleading to the petition or the one-year statute of limitations expires, whichever is earlier.[17] After that time, the Streamlined Procedures Act would treat new claims or modifications to existing claims added by way of amendment as second or successive claims, and would allow the amendment only if it met the more demanding standard that applies to such claims. The standards for second or successive petitions are essentially the same standards as those set forth in section 2254(e)(2).[18]

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[17]Section 3 would also amend 28 U.S.C. § 2242 to delete the language "in the rules of procedure applicable to civil actions," substituting the procedure outlined in proposed new subsection 2244(e).

[18]28 U.S.C. § 2244(b) provides that a claim presented in a second or successive petition that was not presented in a prior application must be dismissed unless the applicant shows that the claim (1) relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, or (2) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error,

Commentary

The Streamlined Procedures Act thus raises the hurdle for amending habeas corpus claims. Under *Mayle*, petitioners can still argue that their new claims meet the "time and type" test and qualify for relation-back. Such arguments, however, would be foreclosed by the broad prohibition against amendment specified in section 3. Section 3 would bar both amendments that present additional claims and amendments that propose to "modify existing claims." Section 3's bar to modification would appear to prevent any reformulation or extension of the claims set forth in the initial petition from qualifying as timely under the relation-back rules. It would thus establish a rule of pleading specificity distinct from the general practice in the federal courts, and it would apply that rule of specificity to claims asserted by habeas corpus petitioners who often appear pro se. It is also worth noting that by filing an early response to the petition, the state could control whether or not the petitioner would have the benefit of the full one-year period in which to amend the habeas corpus petition.

Thus, the Conference opposes section 3 to the extent it would prohibit the federal courts from considering modifications to existing claims or the addition of new claims that meet the requirements of current law. Because claims often evolve during the course of litigation, it would be particularly unfair to prevent a petitioner from modifying an existing claim unless that claim met the higher standards required by section 3. Similar restrictions on adding new claims to the petition could also foreclose meritorious claims in circumstances that might warrant federal court review.

e. The Judicial Conference expresses opposition to section 7 of H.R. 3035 and section 6 of S. 1088 that would make the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applicable to cases pending prior to its enactment, and section 14 of H.R. 3035 and S. 1088 that would make the proposed Streamlined Procedures Act applicable to pending cases.

Current Law

In general, the Supreme Court has adopted a presumption that new legislation should apply prospectively and thus attempts to construe legislation so as to avoid retrospective changes in the legal rules. In 1997, the Supreme Court held that the amendments to chapter 153 enacted as part of AEDPA's reforms would only apply to

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no reasonable fact finder would have found the applicant guilty of the underlying offense. AEDPA established a similar requirement for amendments in cases involving indigent prisoners under sentence of death, but only in cases from states that provided indigent prisoners competent counsel in state post-conviction proceedings.

petitions filed after the effective date of the Act, April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320 (1997).

Proposed Changes

Section 7 of H.R. 3035 and section 6 of S. 1088 would amend section 107(c) of AEDPA by striking the reference to "Chapter 154 of title 28, United States Code (as amended by subsection (a))" and inserting "This title and the amendment made by this title". These sections appear to be intended to apply all of the provisions of AEDPA to pending habeas corpus cases, even cases that were pending prior to the passage of ADEPA in April of 1996.

Section 14 of H.R. 3035 would make the changes included in the Streamlined Procedures Act applicable to federal habeas corpus petitions already pending in the federal courts. The section would also provide that if any time limit established by the Act would run from an event that preceded the Act's enactment, the time limit would begin to run from the date of enactment.

Section 14 of S. 1088 would also make the provisions of the Streamlined Procedures Act applicable to cases pending on and after the date of enactment, *except as otherwise provided in the Act*. Section 2 of S. 1088, relating to mixed petitions, provides that the changes made by that section would apply only to *claims* filed after the date of enactment. Section 3, relating to amendments to petitions, provides that changes made by that section would apply only to *amendments* filed after the date of enactment. Section 4, relating to procedurally defaulted claims, provides that the changes made by that section would not apply to *claims on which relief was granted by a district court* prior to the date of enactment. Finally, section 5, relating to the tolling of the limitation period, provides that the changes made by that section would apply only to *applications* filed after the date of enactment. (The Senate bill also includes language similar to that included in H.R. 3035 defining the beginning date of the time limits imposed by the bill.)

Commentary

Both the House and Senate bills would appear to make the provisions of AEDPA applicable to habeas corpus petitions predating AEDPA's passage. Although this has been described as a relatively small universe of cases, retroactively applying AEDPA to cases that have been in the court system since before 1996 may generate additional legal challenges in these cases, thereby delaying, instead of expediting, their consideration.

In addition, section 14 of H.R. 3035 would make the provisions of the Streamlined Procedures Act applicable to pending habeas corpus petitions. This would include all of the limitations on federal court review of claims and the tolling provisions. As noted

above, section 14 of S. 1088 appears to make some of its provisions prospective only. However, because these sections would impose consequences on the petitioner for actions or omissions in cases currently pending in state court, as well as affect the rights of petitioners who have already filed a habeas corpus petition in federal court, the Senate bill still raises concerns about the application of its provisions to pending cases.

The Act's sections providing for the retroactive application of AEDPA and the provisions of the Streamlined Procedures Act to pending cases raise questions of fairness and judicial administration, and they threaten to undermine the stated goal of the legislation, which is to streamline the processing of federal habeas corpus petitions. At the end of 2004, there were 16,952 habeas corpus petitions, capital and non-capital, pending in the federal district courts. Applying the provisions of the Act to these habeas corpus petitions as proposed by H.R. 3035 and S. 1088 will only add to the burden of processing these cases through the federal courts.[19]

f. The Judicial Conference expresses opposition to the provision in section 11 of H.R. 3035 and section 10 of S. 1088 that would amend 21 U.S.C. § 848(q) to require an application for investigative, expert, or other services in connection with challenges to a capital sentence involving state or federal prisoners to be decided by a judge other than the judge presiding over the habeas corpus proceeding.

Current Law

Under 21 U.S.C.§ 848(q)(9), upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, "the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under paragraph (10). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality." Pursuant to this provision, the judge presiding over the merits of the case may also consider the authorization of and payment for these services. The Guidelines approved by the Judicial Conference of the U.S. implementing this section indicate that these are duties of the presiding judicial officer. *See* paragraph 6.03A of the Guidelines for the Administration of the Criminal Justice Act and Related Statutes, Volume 7, *Guide to Judiciary Policies and Procedures*.

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[19]Section 14 provides that, for time limits "establish[ed]" in the law, the relevant period shall run from the date of enactment. That prevents new time limits from applying retroactively. But the legislation's restrictions on the tolling of existing limitation periods establish no new time limits and would seemingly apply retroactively.

Proposed Changes

Section 11 of H.R. 3035 and section 10 of S. 1088 would amend section 408(q)(9) of the Controlled Substances Act, 21 U.S.C. § 848(q)(9), to require that an application for services other than counsel in a capital habeas corpus case be heard by a judge other than the judge presiding over the habeas corpus litigation.

Commentary

Although this provision may be intended, in part, to respond to concerns of government attorneys who believe that permitting defense attorneys to submit *ex parte* applications for investigative or other services potentially gives the defense an unfair advantage, it does not appear that requiring transfer of these decisions to another judge would serve the interest of sound case management. Such a requirement may prolong resolution of the case and may impede the ability of the presiding judge to move the case forward. This would be particularly true in those districts with a small number of district judges and in districts where judges are separated geographically. Thus, the provision unnecessarily restricts the discretion of the federal judge to manage his or her case, and is an unwarranted intrusion into case-management decisions of the federal courts.

Comments on Section 12 of H.R. 3035 and Section 11 of S. 1088

Although the Judicial Conference did not take a position with respect to section 12 of H.R. 3035 and section 11 of S. 1088, relating to the rights of crime victims, the following comments may be helpful as Members of Congress undertake further consideration of the legislation.

Section 12 of H.R. 3035 and section 11 of S. 1088 would amend 18 U.S.C. § 3771 to extend to crime victims in federal habeas proceedings certain rights made available to victims in federal prosecutions. H.R. 3035 does not specify which rights set forth in the current statute would apply to crime victims in federal habeas proceedings. S. 1088, however, provides that the following rights would be afforded to victims in a federal habeas proceeding: the right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence determines that testimony by the victim would be materially altered if the victim heard other testimony at the proceedings; the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; the right to proceedings free from unreasonable delay; and the right to be treated with fairness and with respect for the victim's dignity and privacy.

While the judiciary strongly supports the goal of providing victims of crime certain rights to participate in the criminal justice process, the current provisions of the

legislation, without further clarification, could create administrative problems. Neither S. 1088 or H.R. 3035 indicate which entity would be responsible for finding and notifying the victim of the underlying crime that federal habeas corpus proceedings will be undertaken.

The Department of Justice is currently required to make its best efforts to ensure that crime victims in federal cases are notified of, and afforded, certain rights. But the Department of Justice would not be a party to habeas proceedings involving state prisoners. (In fact, S. 1088 specifically provides that the legislation does not give rise to any obligation or requirement applicable to personnel of any agency of the executive branch of the federal government.) In addition, implementation of the provisions of this section may be complicated by the requirement to notify victims of state crimes that may have been committed years ago. It should also be noted that often in a federal habeas proceeding, there is no formal hearing before a judge; the judge may decide the case after a review of the record.

For further information, contact the Office of Legislative Affairs, Administrative Office of the United States Courts, at 202-502-1700